

NO. 16305

United States
COURT OF APPEALS
for the Ninth Circuit

RUBY HUMPHREYS, Administratrix of the Estate
of William Orvie Humphreys, Deceased,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the United States District Court
For the District of Oregon.*

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OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Jurisdiction of the District Court is conferred by 28 USC § 1346(b) (Federal Tort Claims Act). Jurisdiction of this court to review the judgment of the District Court is conferred by 28 USC §§ 1291 and 1294(1) and Rule 73, Federal Rules of Civil Procedure.

QUESTION PRESENTED

Whether the trial court properly denied appellant's motion to set aside a previous order of dismissal without prejudice, which would have resulted in the reinstatement of this action subsequent to the expiration of the statute of limitations.

STATUTES AND RULES INVOLVED

28 USC § 2401(b).

Rules 41(a)(2) and 60(b), Federal Rules of Civil Procedure.

—set forth in Appendix.

STATEMENT OF THE CASE

On July 10, 1957, the appellant filed this action in the District of Oregon against the United States of America under the Federal Tort Claims Act for damages for the death of her husband on May 24, 1956 in the Eastern District of Arkansas due to the alleged negligence of an employee of the United States.

In its answer the government asserted as one of its defenses that the venue of this action did not lie in the District of Oregon because the appellant was a resident of the Eastern District of Arkansas at the time the accident occurred in that district.

On March 31, 1958, appellant filed a motion to dismiss the action without prejudice, stating in the motion

that it was the intention of the appellant to refile the action in the State of Arkansas. On the same date the court entered an order that the action "is dismissed without prejudice".

At the time the action was dismissed in the District of Oregon without prejudice, the two-year statute of limitations under the Federal Tort Claims Act (28 USC § 2401(b)) had not yet expired and the action would not be barred until the expiration of another 54 days. The appellant, however, did not file her action in the Eastern District of Arkansas within the two-year period, which expired on May 24, 1958.

On June 18, 1958, appellant filed a motion in the District of Oregon for an order setting aside the order previously entered dismissing the action without prejudice and requesting that the action be reinstated. This motion was denied by the Court on August 4, 1958, following oral argument and the presentation of briefs. This appeal followed.

ARGUMENT

I. Court Properly Denied Appellant's Motion to Reopen this Action Which had been Barred by the Statute of Limitations.

This action was voluntarily dismissed without prejudice on appellant's motion by an order of the court pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. A voluntary dismissal without prejudice leaves the situation as though no action had been commenced. The statute of limitations is not tolled or sus-

pendent during the time this action was pending before being dismissed without prejudice. *Willard v. Wood*, 1896, 164 U.S. 502, 523; *Maryland Casualty Co. v. Latham*, 5 Cir. 1930, 41 F.2d 312; *Bunger v. U.S. Blind Stitch Mach. Corp.*, S.D. N.Y. 1948, 8 FRD 362; 54 CJS, Limitation of Actions, § 287(a).

The effect upon the statute of limitations of a dismissal without prejudice has been briefly stated in 34 Am. Jur., Limitation of Actions, § 281:

"In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him, and if, before he commences a new action after having become non-suited or having had his action abated or dismissed, the limitation runs, the right to a new action is barred."

The same principle was applied by the Supreme Court of the United States in *Willard v. Wood*, supra, at 523:

"The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred. *Alexander v. Pendleton*, 8 Cranch, 462, 470; *Young v. Mackall*, 4 Maryland, 367; Wood on Limitations, §293, and cases cited."

Similarly in *Bunger v. U. S. Blind Stitch Mach. Corp.*, supra, an earlier action had been commenced in the Eastern District of New York and voluntarily dis-

missed. A second action was commenced in the Southern District of New York and the Court held that the earlier action had not tolled the statute of limitations because the voluntary dismissal of the earlier action left the situation just as if the earlier action had never been filed.

The government's consent to the voluntary dismissal in the District of Oregon does not toll or suspend the statute of limitations. In *Sorensen v. Overland Corp.*, D.C. Del. 1956, 142 F. Supp 354, aff. 3 Cir. 1957, 242 F.2d 70, plaintiff commenced an action against the corporation for compensation and indemnification as an officer of the corporation in state court in Michigan, which action was removed to federal court in Michigan, where it was dismissed without prejudice on stipulation of the parties. Subsequent to the expiration of the statute of limitations, a new action was filed in federal court in Delaware. Plaintiff claimed that by reason of the stipulation for dismissal of the Michigan action without prejudice, the Delaware action became a continuation of the Michigan action and the defendant could not urge the statute of limitations. The court held that this contention was without merit and "finds no precedent either in authority or reason."

The two-year period of limitations prescribed by the Federal Tort Claims Act (28 USC § 2401(b)) was not extended by the pendency and dismissal without prejudice of this action. *Jones v. U. S.*, D.C. 1954, 126 F. Supp 10, aff. D.C. Cir. 1955, 228 F.2d 52.

In the *Jones* case, a prior action had been com-

menced in the Southern District of New York and subsequently dismissed following an appeal. The government moved to dismiss a second action brought in the District of Columbia on the ground that it was barred by the statute of limitations. The plaintiff contended that the running of the statute of limitations was suspended during the pendency of the action in the Southern District of New York by virtue of the New York statute which tolls the statute of limitations during the pendency of an action dismissed other than on the merits. The Court held that the period of limitations prescribed by the Federal Tort Claims Act is applicable, rather than the New York statute, and therefore the action was barred by the statute of limitations.

In *Di Sabatino v. Mertz*, M.D. Penn. 1949, 82 F. Supp 248, an action for damages was instituted in the Middle District of Pennsylvania after the one-year period of limitation had expired. An earlier action had been commenced in the Eastern District of Pennsylvania but was dismissed for lack of venue. The Court held that when an action is dismissed, other than on its merits, before the statute of limitations has expired, a new action for the same cause may be instituted within the statutory period, but that in the absence of a special tolling statute, no new action may be commenced after the period of limitation.

This Court has also held that a final order dismissing an action without prejudice for lack of jurisdiction will not toll the statute of limitations and that any subsequent action on the same cause must be commenced

within the period of limitations. *Fern v. U. S.*, 9 Cir. 1954, 213 F.2d 674. In the *Fern* case, the District Court dismissed the first amended complaint for lack of jurisdiction, as it alleged damages in contract against the government in excess of the jurisdictional amount provided by the Tucker Act. A second amended complaint was dismissed as it was not filed within the period of limitations. The filing of the second amended complaint did not serve to reanimate or revitalize the original action which had been finally dismissed for lack of jurisdiction.

In the present case, the court's order, based on appellant's motion, dismissing this action without prejudice, was a final order and leaves the situation as if the action had not been commenced. Any attempt to reopen the case would have to occur prior to the expiration of the two-year statute of limitations prescribed by the Federal Tort Claims Act.

II. The Time within Which an Action Must Be Commenced under the Federal Tort Claims Act Is Jurisdictional.

The time requirement prescribed by the Federal Tort Claims Act granting the right to sue the United States of America is a condition or qualification of the right and is therefore jurisdictional rather than a mere statute of limitations. *Simon v. U. S.*, 5 Cir. 1957, 244 F.2d 703; *Sikes v. U. S.*, E.D. Penn. 1948, 8 FRD 34.

It follows that the bringing of an action under the Federal Tort Claims Act within the specific time set forth in the Act is a condition precedent to the exist-

ence of the cause of action itself. The trial court was therefore without jurisdiction to reinstate this action in order that it might be commenced after the expiration of the period.

It is equally clear that where a statute creates a right of action, the limitation prescribed therein within which the action must be commenced is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action. 34 Am. Jur., Limitation of Actions, § 281, 120 ALR 376, at 379; *U. S. to use of Gibson Lumber Co. v. Boomer*, 8 Cir. 1910, 183 F. 726, 730.

III. There Is No Basis under Rule 60(b), Federal Rules of Civil Procedure, for Setting Aside the Order of Dismissal.

The order of dismissal without prejudice was entered by the court on the motion of appellant, at which time appellant intended to refile this action in the Eastern District of Arkansas. The final order of dismissal in the District of Oregon was, therefore, not entered by reason of mistake, inadvertence, surprise, or excusable neglect on the part of the appellant, the government, or the court. On the contrary, the order was apparently entered on the motion of the appellant in order to avoid any venue question in the District of Oregon and so that the case could be refiled in the Eastern District of Arkansas for the convenience of the witnesses.

There is no contention by appellant that there is any other ground under Rule 60(b) by which the District

Court might have granted an order setting aside the order of dismissal. In particular, no claim has been made that the order of dismissal was entered as the result of fraud, misrepresentation or other misconduct on the part of the government.

The act or omission justifying the setting aside of an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure must have existed at the time of the entry of the order. The rule will not be applied where the only act or omission urged as an instance of excusable neglect was a mistake, inadvertence or failure of the party occurring subsequent to the entry of the order. In *Edwards v. Velvac, Inc.*, E.D. Wisc. 1956, 19 FRD 504, the court held that Rule 60(b) was inapplicable where the only reason urged for setting aside an order was the plaintiff's failure to subsequently file his notice of appeal within the required time. The rule may only be applied when a showing is made that the final order sought to be set aside was entered because of mistake, inadvertence, surprise or excusable neglect occurring at the time of the entry of the order (p. 507):

"The plaintiff does not and cannot point to any instance of mistake, inadvertence, surprise or excusable neglect, the happening of which resulted in the entry of the judgment from which he asks relief."

Rule 60(b), therefore, should not be used as a means of circumventing other rules or statutes. In the *Edwards* case, the court did not allow the rule to be used to set aside a final judgment in order that the time for appeal might begin anew merely because appellant failed to file

his notice of appeal timely. In the present case, the trial court refused to apply the rule to set aside a final order dismissing the action merely because the appellant subsequently failed to refile the action within the period of limitation.

Appellant's subsequent failure to refile the action within the period of limitation did not create any ground for the application of Rule 60(b). The trial court did not abuse its discretion in denying appellant's motion, as appellant's situation did not present any basis for the exercise of discretion.

CONCLUSION

The court properly denied appellant's motion to reopen this action. The voluntary dismissal without prejudice left the situation as though no action had been filed. The period of limitation continued to run uninterrupted by the pendency and dismissal of the action in the District of Oregon and expired prior to appellant's attempt to reopen the case. The period of limitation incorporated in the Federal Tort Claims Act is jurisdictional and cannot be extended by the pendency and dismissal of the former action.

There was not any abuse of discretion by the trial court in denying appellant's motion to set aside the final order of dismissal. In fact, appellant's situation did not present any basis for the exercise of discretion. The entry of the order of dismissal was not the result of any mistake, inadvertence or excusable neglect. Appellant's

subsequent failure to refile the action is not a proper ground for relief under Rule 60(b), Federal Rules of Civil Procedure.

It is respectfully submitted that the trial court properly denied appellant's motion to set aside the order of dismissal without prejudice, which would have resulted in the reinstatement of this action subsequent to the expiration of the period of limitation prescribed by the Federal Tort Claims Act.

Respectfully submitted,

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May, 1959.

APPENDIX

28 USC §2401(b)

“A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. . . .”

RULE 41, FEDERAL RULES OF CIVIL PROCEDURE
“DISMISSAL OF ACTIONS

“(a) *Voluntary Dismissal: Effect Thereof—*

* * *

“(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.”

RULE 60, FEDERAL RULES OF CIVIL PROCEDURE

“(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, re-

leased, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." * * *